No. 10434.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPHINE WELCH OVERTON, as Executrix of the Estate of Galen H. Welch, deceased, formerly Collector of Internal Revenue for the Sixth Collection District of California,

Appellant,

vs.

MAE H. SAMPSON, individually and as Executrix under the will of W. O. Sampson, deceased,

Appellee.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

BRIEF FOR THE APPELLANT.

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Appellee.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

BRIEF FOR THE APPELLANT.

Opinion Below.

The only opinion of the District Court, which is reported in 23 F. Supp. 271, was withdrawn by order entered January 9, 1941 [R. 49-50], reported in 40 F. Supp. 1014.

Jurisdiction.

This appeal [R. 112] involves federal estate taxes. The taxes in dispute were paid as follows: $1,197.09 on December 16, 1931; $223.81 on December 23, 1932 and

$254.21 on December 28, 1932. [R. 83.] Claim for refund was filed on November 24, 1933 [R. 85], pursuant to Section 910 of the Internal Revenue Code. The claim for refund was rejected by notice dated July 13, 1934. [R. 85.]

Within the time provided in Section 3772 of the Internal Revenue Code and on August 30, 1935, the taxpayer brought an action in the District Court for the Southern District of California, Central Division, for recovery of taxes paid. [R. 2-19.] Jurisdiction was conferred on the District Court by Section 24, Fifth, of the Judicial Code. Judgment was entered in the principal sum of $1,466.11, plus interest, on October 7, 1942. [R. 102-104.][1] Motion for a new trial was denied November 17, 1942. [R. 111-112.] Within three months and on February 16, 1943, a notice of appeal was filed [R. 112], pursuant to the provisions of Section 128(a) of the Judicial Code, as amended by the Act of February 13, 1935.

Question Presented.

On May 23, 1929, the decedent, William O. Sampson, and his wife, who were residents of California, entered into a written agreement by which decedent transferred to his wife an interest in various real and personal property, including (1) property then separately owned by the decedent and (2) community property acquired prior to the amendment to the California community property laws

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[1]Judgment was entered for the principal amount of $1,466.11, but the computation involved certain items which are not included in this appeal. According to a tentative computation made by the Bureau of Internal Revenue, the principal amount of the judgment, if the Collector is sustained on this appeal, should be reduced to $680.06. The difference represents the principal amount at stake.

which became effective June 29, 1927. The interest so transferred was the type of interest conferred by the amendment to the California law upon married women in community property acquired subsequent to July 29, 1927. The question is whether the full value or only one-half of the value of the two classes of property referred to is includible in decedent's gross estate under Section 302(c) and (d) of the Revenue Act of 1926.

Statutes and Regulations Involved.

The pertinent statutes and regulations are set forth in the Appendix, *infra.*

Statement.

So far as necessary to this appeal, the findings of fact made by the District Court may be summarized as follows:

1. The decedent, William O. Sampson, died on December 28, 1930. At all pertinent times he and his wife were residents of the State of California. [R. 82.] On May 23, 1929, decedent, designated as the first party, and his wife, designated as the second party, entered into a written agreement [R. 83-85] providing [R. 84]:

> 1. That all property now owned by the first party shall be and the same is hereby declared to be community property of the parties hereto.
>
> 2. That the respective interests of the parties hereto in their community property during the continuance of the marriage relation are and shall be present, existing and equal interests under the management and control of the husband, first party hereto, as is provided in Sections 172 and 172(a) of the Civil Code of the State of California.

3. That this agreement is intended and shall be construed as defining the respective interests and rights of the parties hereto in and to all community property, and the rents, issues and profits thereof, heretofore or hereafter acquired by the parties hereto during the continuance of said marriage relation.

First party does hereby assign, transfer and convey unto second party such right, title and interest in and to said community property as may be necessary to carry into full force and effect the terms of this instrument.

2. In computing the federal estate tax, the Commissioner of Internal Revenue included within decedent's gross estate the entire value of certain real and personal property which had been acquired by him prior to July 29, 1927. At the time of its acquisition, a part of the foregoing was (1) the separately-owned property of the decedent, received by gift, and the balance was (2) community property of the type then existent in California, acquired with funds earned by the decedent. [R. 87-90.] By force of the agreement of May 23, 1929, the two classes of property referred to were converted into community property of the spouses of the type acquired by California married persons after July 29, 1927. [R. 90-91.]

3. Appellee, as executrix under the will of the decedent, paid the taxes here in controversy. [R. 82-83.] Appellee then filed a claim for refund contending that only one-half of the value of the property in question was

properly includible in decedent's gross estate, in that it consisted at the time of decedent's death wholly of community property in which she, as decedent's widow, had a vested interest in the remaining one-half. [R. 9-19, 85.] The claim for refund was rejected in its entirety [R. 85], and the instant suit for refund was then brought against the Collector of Internal Revenue for the Sixth Collection District of California in office at the time payments of the tax were made. [R. 2-19, 81-83.] Upon the Collector's death during the pendency of the suit, his executrix, the appellant (also referred to herein as the Collector), was substituted in his place. [R. 50-51, 97-98.]

Following trial without a jury, the court below filed a written opinion holding that the full value of the property in question should be included within decedent's gross estate under Section 302 (c) and (d) of the Revenue Act of 1926. (23 F. Supp. 271.) On January 9, 1941, the opinion was withdrawn, due to the supervening decision of this Court in *United States v. Goodyear,* 99 F. (2d) 523, which the court below regarded as [R. 49]—

> controlling, as a matter of legal precedent, over the issues in the case at bar, even though the opinion heretofore rendered in this cause * * * expresses the view of this court as to a proper determination of said issues.

The court thereafter entered the findings of fact which have been summarized and, so far as now material, concluded as a matter of law that [R. 99-100]—

1. The effect of the agreement of May 23, 1929, was to vest in decedent's wife "a present, existing, and equal interest in the property" of the decedent, as if the property had been acquired from the community earnings of the decedent earned subsequent to July 29, 1927.

2. The interest in the property of the decedent and his wife so acquired under the agreement of May 23, 1929, was such as to require the exclusion from the decedent's gross estate of one-half of the value of all of the property owned by the decedent and his wife at the date of the former's death.

Statement of Points to Be Urged.

The Collector's statement of points, all of which are urged as grounds for reversal, is set out in full at pages 223-228 of the record. The critical error of the court below lies in its holding, under the compulsion of the decision of this Court in *United States v. Goodyear, supra,* that only one-half of the value of the property in question should be included in decedent's gross estate.

Summary of Argument.

A. This appeal concerns only the separately-owned property of the decedent and the pre-1927 California community property, which were included within the transfer agreement of May 23, 1929. By force of that agreement, these two classes of property were converted into post-1927 community property. The question is whether, upon the husband's death, the full value or only one-half the value of this property should be included within his gross estate for federal estate tax purposes. The case turns, not upon Section 302 (a) of the Revenue Act of

1926, but upon Section 302 (c) and (d), which expressly deal with *inter vivos* transfers and presuppose the transfer of an interest in property by the decedent prior to his death. A decision favorable to the Collector will require the overruling of *United States v. Goodyear,* 99 F. (2d) 523 (C. C. A. 9th). The importance of the question and the decisions of the Supreme Court of California and of the Supreme Court of the United States subsequent to that decision should lead this Court to overrule the *Goodyear* case if it is now satisfied that the Government's position is correct.

B. The rights reserved to the decedent under the 1929 transfer were the same as the rights which are vested in California husbands in post-1927 community property. The decedent thus reserved the management and control of the transferred property. He was able to divest his wife of her interest in any particular item or in all of the community property, real or personal. Upon his death, the community property remained subject to his liabilities and only the residue became available to his wife. In these crucial respects, the 1927 amendment to the California community property law made no change in the prior law.

C. Against this background, it seems clear that the 1927 amendment does not touch the application of Section 302 (c) and (d). In principle and under the decisions, the full value of the transferred property must be included in decedent's gross estate. Decedent's death was the indispensable condition which passed to the surviving wife valuable assurances that the interest transferred *inter vivos* would be reduced to her "possession" and "enjoyment."

ARGUMENT.

The Full Value of the Property in Question Should Be Included in Decedent's Gross Estate Under Section 302 (c) and (d) of the Revenue Act of 1926.

A. The Collector's Position on This Appeal.

This appeal involves only the decedent's separately-owned property and the pre-1927 community property, included within the transfer of May 23, 1929. The case turns upon Section 302 (c) and (d) of the Revenue Act of 1926. [Appendix, *infra.*] The pertinent regulations are Treasury Regulations 70 (1929 ed.), Articles 15, 17 and 19. [Appendix, *infra.*][2] If the case falls within either of these subsections of the statute, the full value of the property in question, rather than only one-half of the value as held by the court below, must be included within decedent's gross estate for purposes of the federal estate tax.

We recognize that a decision in favor of the Collector on this appeal will require the overruling of the decision of this Court in *United States v. Goodyear,* 99 F. (2d) 523, which was reached by a divided bench in October, 1938. Our normal reluctance in asking this Court to depart from an earlier decision is considerably lessened in the present instance by several important circumstances. This case involves (1) an appraisal of the substantial

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[2]We also print in the Appendix, *infra,* Section 81.17 of Treasury Regulations 105, promulgated under the Internal Revenue Code, since this section deals with the application of *Helvering v. Hallock,* 309 U. S. 106, and that decision, which deals with Section 302 (c), did not turn on any amendment made to Section 302 (c) subsequent to its enactment in 1926. It is proper to look to regulations promulgated under subsequent statutes for their significance in declaring the proper interpretation of an earlier statute. *Estate of Sanford v. Commissioner,* 308 U. S. 39, 49.

benefits and powers vested in the husband with respect to California community property and (2) the application of a federal revenue statute to the aggregate of advantages so established by state law. At the time of the *Goodyear* decision, the Supreme Court of California had not passed upon the 1927 amendment to the California community property law. Since that time the highest court of the state has examined the significance of that amendment. In addition, since the *Goodyear* decision there has been an extremely important decision of the Supreme Court of the United States under Section 302 (c)—*Helvering v. Hallock,* 309 U. S. 106—and there has been a series of other decisions re-emphasizing and applying to new facts the principle that the federal revenue laws are concerned not so much with the refinements of title as with the possession of control and enjoyment. This Court did not have the benefit of these decisions when it decided the *Goodyear* case in 1938. Nevertheless the case was decided by a divided court. The decisions affecting the issue which have been rendered since 1938 lend further support to the position of the Judge who dissented in that case and clearly justify an inquiry as to whether the premises on which the majority based its conclusion were sound.[3]

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[3]If this Court should now overrule the *Goodyear* decision, it would, we submit, simply be following the path already marked by its decisions in *Wardell v. Blum,* 276 Fed. 226, certiorari denied, 258 U. S. 617, and *Talcott v. United States,* 23 F. (2d) 897, certiorari denied, 277 U. S. 604. In the first of these cases (neither of which involved a transfer) it was held that upon the death of a husband only one-half of the value of California community property should be included within his gross estate. Following the decision of the Supreme Court of California in *Stewart v. Stewart,* 199 Cal. 318, and the decision of the Supreme Court of the United States in *United States v. Robbins,* 269 U. S. 315, this Court later held in the *Talcott* case, *supra,* that the full value of the community property should be included in the husband's gross estate. This was also the decision in *Title Insurance & Trust Co. v. Goodell,* 60 F. (2d) 803 (C. C. A. 9th), certiorari denied, 288 U. S. 613.

A further circumstance also justifies re-examination of the *Goodyear* case. The federal estate tax, like the income tax, is related to ability to pay, and should, so far as possible, operate uniformly throughout the country and impose a like burden on the estates of married persons wherever domiciled. That married persons domiciled in the community property states possess tax advantages over those domiciled in the common law states cannot be denied.[4] Such an inequality and lack of uniformity should be restricted to instances where the reasons for it are compelling. The federal estate tax law does not itself establish one set of rules for determining the gross estate of a decedent spouse in the common law states and another set of rules for determining the gross estate of a decedent spouse in the community property states, and a difference in the tax burden is justified only if there are in fact substantial differences between the rights and privileges of the spouses in the two groups of states. It should not exist where there are merely differences in the labels given to similar rights and privileges. See *Morgan v. Commissioner*, 309 U. S. 78. Moreover, since the different subdivisions of Section 302, defining the gross estate, establish different criteria for the inclusion of property in the decedent's gross estate, judicial decisions establishing that under one subdivision only one-half of the community property is to be included in the gross estate do not justify any assumption that the same tax advantage accrues under a different subdivision. Tax advantages enjoyed by the spouses in the community

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[4]As to the magnitude of the discrimination against the inhabitants of the non-community property state permitted under the prevailing rule as to income, we need add nothing to the comments of Judge Haney, dissenting in *Black v. Commissioner*, 114 F. (2d) 355, 360 (C. C. A. 9th).

property states should be restricted in so far as they may be, consistently with settled judicial principles. If, therefore, this Court should feel that the *Goodyear* case was wrongly decided and that, as a matter of first impression, the decision would go for the Government, we submit that these considerations should remove any inhibition against a flat reversal of that holding.

The *Goodyear* decision has now been in the books for about five years. In *Helvering v. Hallock, supra,* the Supreme Court expressed no reluctance in overruling its earlier decision in *Helvering v. St. Louis Trust Co.*, 296 U. S. 39, although that case also had stood for more than four years. The Supreme Court said that this was not so long a period that (309 U. S. at p. 119) "by the accretion of time and the response of affairs, substantial interests have established themselves." In the instant case, it is noteworthy that the decedent could have placed no reliance upon the *Goodyear* decision, for the transfer was made in 1929 and his death occurred in 1930.

In the discussion which follows we examine under Point B, *infra,* the benefits and powers reserved to the husband under California community property law and under Point C, *infra,* the application of the estate tax to this aggregate of interests. At the outset, however, a further statement of our position and of the scope of Section 302 (c) and (d) seems desirable. It should be understood that we do not contend that the agreement of May 23, 1929, was ineffective to transfer to the wife an interest in the property. We assume that the wife took what she purported to take, namely, a "present, existing and equal" interest under the management and control of the husband, as provided in Sections 172 and 172 (a)

of the Civil Code of California; that is, the type of interest that married women in California take in community property acquired after June 29, 1927. Nor do we contend that the full value of community property acquired with the husband's earnings after July 29, 1927, is includible in his gross estate. If the value of the wife's one-half share in such property were to be taxed to the estate of the decedent, it would probably come within Section 302(a) of the statute, which is confined to property in which the decedent has an "interest" at the time of his death and has nothing to say of *inter vivos* transfers.[5] See *Gump v. Commissioner*, 124 F. (2d) 540 (C. C. A. 9th), certiorari denied, 316 U. S. 697. We rely, instead, upon Section 302 (c) and (d), which expressly deals with *inter vivos* transfers by the decedent.

Subsections (c) and (d) of Section 302 in identical language deal with "any interest" in property "of which the decedent has at any time made a transfer, by trust or otherwise." When the transfer of such property falls within the provisions of either of these subsections, its full value is included in the decedent's gross estate. From the quoted language it will be seen that both subsections take as their starting point the fact that the decedent has made an *inter vivos* transfer of a property interest (of whatever kind) and, necessarily, no longer has the transferred interest at the date of his death. That legal title to the property or any other specific interest has been conveyed away *inter vivos* thus invites, rather than fore-

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[5]However, by Section 402 of the Revenue Act of 1942, c. 619, 56 Stat. 798, the full value of community property acquired subsequent to July 29, 1927, will be included in the estate of the spouse first to die, where death occurs after the effective date of that section, except that portion actually contributed by the surviving spouse.

closes, further scrutiny. See *Helvering v. Hallock,* 309 U. S. at pp. 110-111, as to Section 302 (c), and *Porter v. Commissioner,* 288 U. S. 436, 443, as to Section 302 (d). In this crucial respect Section 302 (c) and (d) must be sharply distinguished from Section 302 (a).

Under subsection (c) the full value of the transferred property is taxable to the decedent where the interest transferred is "intended to take effect in possession or enjoyment at or after his death." Under subsection (d) the full value of the transferred property is taxable to the decedent where the enjoyment of the transferred interest is "subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke." The purpose of these provisions is to prevent the avoidance of the estate tax by means of a transfer by the person to whose estate the property would otherwise be taxable, unless the transfer in fact as well as form terminates the decedent's connection with the property. Where the transfer is complete in form but the decedent retains strings through which control can be asserted or benefits diverted to himself, the full value of the property remains includible within his gross estate.[6]

From the very nature of these provisions, it is unimportant that the aggregate of the benefits and powers vested in the decedent would not, apart from the element of the transfer, be sufficient to bring down the tax. To take a simple illustration, under Section 302 (c), if A

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[6]These subsections thus apply with particular force to transfers such as that involved here, the underlying purpose of which is not to effect a change in property interests but simply to save taxes. That this was the underlying purpose of the transfer of May 23, 1929, seems clear from the uncontradicted testimony. [R. 197, 202.]

transfers a life estate to B with remainder in fee to B unless A survives him, and in that event a reversion to A, the value of the reversion must be included in A's estate upon A's death prior to B's. On the other hand, if A transfers a life estate to B with remainder in fee to B unless C survives B, and in that event remainder in fee to C, the value of C's contingent remainder in fee is not includible within C's gross estate upon his death prior to B's.[7] In these two situations, it will be seen that after the transfers the contingent interests of A and C, respectively, are identical. The difference in tax consequences flows from the fact that it was A who was the original owner of the property and that it was A who made the transfer.[8] Accordingly, no confusion should result from the fact that on this appeal we assume that community property *acquired* after July 29, 1927, with respect to which no transfer is involved, is includible in the decedent's estate only to the extent of one-half of its value.

From the foregoing it should also be clear that our position involves no attack upon *United States v. Malcolm*,

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[7]Compare the Court's decision in *Helvering v. Hallock, supra*, with the examples cited by Mr. Justice Roberts in his dissenting opinion in that case.

[8]Also see *White v. Poor*, 296 U. S. 98, involving Section 302 (d), which emphasizes to an extreme degree the importance of a transfer and the reservation to the decedent of powers with respect to the transferred interest. In that case the decedent established a trust naming herself one of three trustees, and provided that the trustees might at any time terminate the trust. She later resigned as trustee but was reappointed with the approval, as required by the trust instrument, of the other trustees and the beneficiaries. Referring to her reappointment, the Court said (p. 102):

> "She then acquired any power for the future to participate in a termination of the trust solely by virtue of the action of the other trustees and the beneficiaries *and not in any sense by virtue of any power reserved to herself as settlor in the original declaration of trust.*" [Italics supplied.]

On this basis, the case was held to fall outside Section 302 (d) and decision went for the taxpayer. (A second, independent ground of decision is not material here.)

282 U. S. 792, or upon *Poe v. Seaborn,* 282 U. S. 101, and the companion cases. For these cases, which held that community property income could be divided equally between husband and wife for tax purposes, did not involve transfers to the wife by the husband. The theory of these cases was that the wife's share of the community property was never owned by the husband but that ownership vested immediately in her at the time of acquisition. The opinion in the *Seaborn* case carefully distinguished *Corliss v. Bowers,* 281 U. S. 376, and *Lucas v. Earl,* 281 U. S. 111, in both of which a husband's transfer of corpus or income was held ineffective to relieve him from the tax on the whole income. It was necessary for the Court to deal with these decisions because of the similarities between the husband's position in these cases and the husband's position under the law of the community property states; absent such similarities, there would have been no need to refer to them. The *Court* distinguished the *Corliss* case on the ground (282 U. S. at p. 117):

> But here the husband never has ownership. That is in the community at the moment of acquisition.

Likewise, the Court distinguished the *Earl* case with the comment (282 U. S. at p. 117):

> The very assignment in that case was bottomed on the fact that the earnings would be the husband's property, else there would have been nothing on which it could operate. That case presents quite a different situation from this, because here, by law, the earnings are never the property of the husband, but that of the community.

The community property decisions of the Supreme Court thus tend to emphasize rather than minimize the im-

portance of a transfer. They do not conflict in any sense with our position in the instant case, and on the contrary, underscore the emphasis which we place on the transfer involved here.[9]

B. The Benefits and Powers Reserved to the Decedent Under the Transfer of May 23, 1929.

The agreement of May 23, 1929, purported to reserve to the husband the benefits and powers over his separately-owned property and the community property acquired prior to June 29, 1927, which were given him by statute in the community property acquired subsequent to June 29, 1927. We, therefore, look to the community property law of California as it existed during the period from May 23, 1929, to December 28, 1930 (the date of decedent's death), in order to determine the benefits and powers *reserved* to the husband under this *transfer*. Consistent with the facts of the present case, we assume that the community property in each instance is traceable to the husband's earnings.[10]

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[9]At the same time, we believe that *Poe v. Seaborn, supra,* and companion cases (upon which *United States v. Malcolm, supra,* in turn, was based) attached too little significance to the substantial benefits and powers possessed by the husband. Those cases involved the sections of the income tax laws which imposed a tax on "the net income of every individual." Those sections, unlike the sections of the estate tax law involved in the instant case, refer to the taxpayer's "ownership" (282 U. S. at p. 9) of the income. Even so, the mechanical approach utilized in these community property cases seems inconsistent with both the previous and subsequent decisions of the Supreme Court. See the second ground of decision in *United States v. Robbins,* 269 U. S. at pp. 327-328, and *Helvering v. Clifford,* 309 U. S. 331. Randolph Paul would seem to be guilty of no overstatement when he observes that "only a bold person" would assert that *Poe v. Seaborn* would be decided the same way, as a matter of first impression, by the present Supreme Court. See I Paul, Federal Estate and Gift Taxation (1942) 62.

[10]The citations which hereafter appear are, of course, in no sense exhaustive. We might have contented ourselves with citation of the recent case of *Grolemund v. Cafferata,* 17 Cal. (2d) 679, certiorari denied, 314 U. S. 612, for most of the propositions stated.

1. In the words of the statute, the respective interests of the husband and wife in community property during the marriage relation are "present, existing and equal interests." Civil Code, Section 161a, enacted in 1927. [Appendix, *infra.*] But this language is followed immediately by the proviso—

> under the management and control of the husband as is provided in section 172 and 172a of the Civil Code.

These later sections, together with Sections 167 and 171a [Appendix, *infra*], relating to the wife's contracts and torts, all of which are of long standing, establish the framework of the benefits and powers reserved to the husband during the marriage.

2. The control and management of community property, both real and personal, is vested exclusively in the husband and is exercisable by him in his sole discretion, subject only to certain specific statutory safeguards designed to protect the wife. Civil Code, Sections 172 and 172a [Appendix, *infra*]; *Grolemund v. Cafferata,* 17 Cal. (2d) 679, certiorari denied, 314 U. S. 612; *Stewart v. Stewart*, 199 Cal. 318, 204 Cal. 546; *Spreckels v. Spreckels*, 116 Cal. 339. Thus, the husband may at his election divest the wife of her interest in any specific item or in all of the community personal property (excepting home furnishings and the wife's and minor children's wearing apparel) simply by disposing of it for a valuable (although not necessarily adequate) consideration. Civil Code, Section 172. He may not sell or mortgage the community real property unless his

wife joins[11] with him, but he is free at his own election and without her consent to lease such real property for successive periods not exceeding one year. Civil Code, Section 172a. Moreover, a purchaser or mortgagee taking in good faith without knowledge of the marriage relationship from a husband who holds a record title to community real property is presumed to acquire a valid title; and if the wife is to protect her interests following such a transaction she is charged with prompt action. Civil Code, Section 172a. If his wife consents, a husband may make a gift of any community property. Civil Code, Sections 172 and 172a. The wife, on her part, is powerless to convey, encumber or lease the property, real or personal. Civil Code, Section 167; *Smedberg v. Bevilockway,* 7 Cal. App. (2d) 578.

3. As a corrollary of these powers of management and control, the husband is not liable to his wife for mismanagement, negligence, or extravagance. It is true that he may not dissipate the assets by making gifts (*Johnson v. United States,* 135 F. (2d) 125 (C. C. A. 9th)), but community assets may be dissipated in other ways and the wife has no redress. Whether he congenitally buys the wrong stock, bets on the wrong horse, or nourishes a taste for high living far exceeding his wife's wishes, no remedy is conferred upon her either by statute or court decision. If the husband accumulates any property he does so voluntarily. See *Spreckels v. Spreckels,* 116 Cal. 339, 345; *Garrozi v. Dastas,* 204 U. S. 64; *United States v. Robbins, supra.*

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[11]Strictly speaking, the wife probably does not join with the husband in conveying real property but merely gives "an expression of her assent" to the conveyance. See *Riley v. Gordon,* 137 Cal. App. 311, 315-316, which dealt with pre-1927 community property. The husband and wife do not hold community property as tenants by the entirety. See Civil Code, Section 161, Appendix, *infra.*

4. The husband's debts and other liabilities, whether or not they arise out of any activity of benefit, or intended to be of benefit, to the community, may be discharged from community property, both real and personal. The husband's duty to support his wife and minor children does not rest on the community property statutes, but he may discharge this obligation either from his separately-owned property or from the community property. At his sole election, a husband may dispose of community personal property in order to satisfy contractual, tort or statutory liability incurred by him alone, and it seems to follow that he has the same right with respect to real property. At any rate, it is settled that on judgment and execution a victim of the husband's negligence can reach community property, both real and personal, in order to satisfy the liability incurred, and that the wife is powerless to protect her "present, existing and equal" interest in it. *Grolemund v. Cafferata, supra; Brunvold v. Victor Johnson & Co.,* 138 P. (2d) 32 (Cal.), See *Altramano v. Swan,* 20 Cal. (2d) 622. 629. The liabilities of the wife, on the other hand, even though arising from tort or statute, may not be satisfied from community property, except to the extent that such property is traceable to her own earnings. *Grolemund v. Cafferata,* 17 Cal. (2d) at pp. 684-685; *Grace v. Carpenter,* 42 Cal. App. (2d) 301. In cases of transfers from the husband of separately-owned and old-type community property purchased with funds earned by him, such as here, this last provision is obviously of no consequence.

Conversely, the liability of the husband, when acting for the benefit of the community, is not limited to that

of a common law agent or trustee when dealing with third persons.[12] The husband's separately-owned property, as well as the community property, may be reached in satisfaction of such obligations. See *Spreckels v. Spreckels, supra; Hulsman v. Ireland,* 205 Cal. 345. But the separate earnings of the wife, though community property, may not be applied in satisfaction of debts contracted by the husband even though for the benefit of the community. *Street v. Bertolone,* 193 Cal. 751.

5. Against this background, it would be indeed remarkable if it could properly be said that the wife is entitled equally with her husband to the possession of community property. To the contrary, it seems well settled that, *as a concomitant of his powers of management and control,* the husband is entitled to the exclusive possession of the community property. *People v. Swalm,* 80 Cal. 46; *Fennell v. Drinkhouse,* 131 Cal. 447; *Estate of Dargie,* 179 Cal. 418; *McMullin v. Lyon Fireproof Storage Co.,* 74 Cal. App. 87, 92-93; *Salveter v. Salveter,* 135 Cal. App. 238; *Beemer v. Roher,* 137 Cal. App. 293. See Civil Code, Section 1402 [Appendix, *infra*], referring to the husband's right of possession as against the deceased wife's personal representative. If theory be resorted to, it appears that a wife's physical possession, when she has it, is the husband's legal possession. *People v. Swalm,* 80 Cal. at pp. 49, 50. As a general rule, it is the husband alone who may sue to recover the possession of community property, and assert rights respecting it. *Chance v. Kobsted,* 66 Cal.

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[12]California does not recognize any legal entity separate and distinct from the parties comprising the community. *Jones v. Weaver,* 123 F. (2d) 403 (C. C. A. 9th); *Grolemund v. Cafferata, supra.*

App. 434. During her husband's lifetime, a married woman is neither a necessary nor a proper party to such an action. See *Spreckels v. Spreckels,* 116 Cal. at p. 349; *Caputo v. Fusco,* 54 Cal. App. 191; *La Rosa v. Glaze,* 18 Cal. App. (2d) 354.

6. The respective rights of the husband and wife upon the death of one of them are governed by Sections 1401 and 1402 of the Civil Code (now Sections 201, 202 and 203 of the Probate Code). In general, one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent and, absent such disposition, goes to the surviving spouse. But there is an important qualification in the case of community property passing from the control of the husband, whether by reason of his death or the testamentary disposition of the wife as to her share. Such property, while not liable for the wife's debts (*Estate of Klumpke,* 167 Cal. 415), remains subject to the husband's debts, the family allowance and the charges and expenses of administration. Thus, upon the husband's death, the wife takes as her share of the community property only the residue remaining after such charges have been satisfied. And, even though the separate property of the husband or his share of the community property is sufficient to satisfy these charges, they are nevertheless apportioned *pro rata* between his property and the wife's share of the community property. *Estate of Coffee,* 19 Cal. (2d) 248.

Grolemund v. Cafferata, supra, and *Estate of Coffee, supra,* are of unusual significance because they were decided as late as 1941, subsequent to the decision of this Court in *United States v. Goodyear, supra,* and be-

cause they are the first pronouncements of the Supreme Court of California as to the effect of the 1927 amendment. As indicated above, *Grolemund v. Cafferata, supra,* held that community property, both real and personal, can be sold on execution to satisfy a judgment secured against a husband alone in consequence of his tort (negligent operation of an automobile), and *Estate of Coffee, supra,* held that the share of the community property passing to the surviving wife upon the death of the husband is the net property remaining after the husband's debts, the family allowance and the expenses of administration have been satisfied.

The *Grolemund* opinion stated that fundamental to the determination of the case was the question of the changes wrought in the community property system by the enactment of Section 161a of the Civil Code in 1927. 17 Cal. (2d) at p. 682. The opinion considered the community property system at many points and concluded in each instance that the 1927 amendment had made no change. The "present, existing and equal" interest conferred upon the wife by the 1927 amendment was brushed aside as of little significance since, as the court pointed out, the community property still remained subject to the "management and control" of the husband as provided by Sections 172 and 172a. The court concluded (p. 689) that Section 161a had "not altered the situation with respect to the wife's interest remaining subject to the husband's power of management and control * * *." It recognized that the husband thereby retained the power to divest the wife of her interest in community property. In the course of its discussion, the court cited with approval (p. 687) the original "decision" of the court below in the instant case and twice

referred to the court's opinion, quoting a passage from it (pp. 687 and 698). It emphasized (p. 687) that the provision making the entire community property subject to the husband's debts when it passed from his control by reason of his death or by virtue of testamentary disposition by the wife, was "antagonistic" to the theory that Section 161 (a) gave the wife a vested interest, which no act of the husband could affect. The court also cited with approval *Smedberg v. Bevilockway, supra,* for its implicit holding that the effect of Section 161a was not to change the nature of the wife's interest in community property into a vested interest (pp. 685-686).[13] Finally, referring to *United States v. Malcolm,* 282 U. S. 792, the court stated (p. 689) that this decision expressed the prevailing view of the federal courts to the effect that a California wife has such a present and vested interest in the community property that she may file a separate income tax return; the court added, however, that this could have no bearing on the question at issue.

The opinion in *Estate of Coffee, supra,* likewise failed to point to any change made in the community property system by the 1927 amendment and, in fact, did not even mention Section 161a. This opinion also quoted with approval (19 Cal. (2d) at p. 252) from the opinion of the court below in the instant case (although that opinion

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[13]In *Brunvold v. Victor Johnson & Co., supra,* the District Court of Appeal referred to the wife's as a "vested interest" (138 P. (2d) at p. 35), and in so doing seems to have exceeded the limits of the *Grolemund* opinion. In view of the management and control plainly reserved to the husband, we do not attach importance to this point. However, it may be noted that the court used the expression "vested interest" in answering the appellant's argument that the result reached in favor of the judgment creditor was unconstitutional. The burden of the court's answer was that even if the wife had a vested interest, still the legislature could constitutionally impose the condition that the property should be subject to the husband's debts.

had then been withdrawn for a period of some eleven months).

It will be recalled that the decision of the Supreme Court in *United States v. Malcolm, supra,* holding that a California wife has such an interest in the community poperty income that she might separately report and pay a tax on one-half of it, issued on the Government's concession that the amendments to the California community property law not involved in *United States v. Robbins,* 269 U. S. 315 (which was concerned with community property acquired prior to 1917), justified this result. This concession was thought to be required by the subsequent amendments to the California law and the decision in *Poe v. Seaborn,* 282 U. S. 101, which held that the wife's interest in community property in the State of Washington was a *vested* interest, and the other cases decided at the same time as the *Seaborn* case. In the light of the two recent decisions of the Supreme Court of California, it may be questioned whether the Government's concession in the *Malcolm* case was providently made and whether the decision of the Court has continuing vitality.[14] In this connection, it must be borne in mind that the amendments to the community property law of 1917 and 1923 did not convert the interest of the wife into something more than an expectancy. This Court recognized that that was so in the *Goodyear* decision. As to the 1917 amendments (requiring the wife to join in conveyances of real estate, etc.), see *Stewart v. Stewart, supra.* As to the 1923

[14]But see *Commissioner v. Cavanagh,* 125 F. (2d) 366, 368, in which this Court stated that "The *Grolemund* case in no manner touches the principles leading to the *Malcolm* decision."

amendment (giving the wife the right of testamentary disposition over her share of the community property, etc.), see *Trimble v. Trimble,* 219 Cal. 340; *Spreckels v. Spreckels, supra,* p. 344; and *Gillis v. Welch,* 80 F. (2d) 165 (C. C. A. 9th), certiorari denied, 297 U. S. 722. In the last-cited case it was held that upon a gift by a husband to his wife of community property acquired in 1924 a federal gift tax was payable on the full value of the property.[15] Thus it will be seen that both the *Malcolm* and *Goodyear* decisions apparently rest on nothing more substantial than the 1927 amendment to the community property law.

As we have pointed out, however, we do not challenge the *Malcolm* decision, which did not involve estate taxes and was not concerned with transfers. It suffices to say that the two recent decisions of the California Supreme Court do warrant a re-examination of the references to the community property law set out in the *Goodyear* opinion.

The *Goodyear* opinion placed emphasis on the circumstance that under Section 161 (a) the transfer was effective to confer upon the wife a "present, existing and equal interest" in the community property (99 F. (2d) at pp. 526-527), but this statutory phrase must be construed in conjunction with other provisions of the community property law. When those are given effect, it

[15]This case involved a gift of 1923-1927 community property to the wife, who thereafter held the subject of the gift "as a part of her separate estate" (80 F. (2d) at p. 167). The nature of the gift is thus to be carefully distinguished from the instant gift, which served to convert the husband's separtely-owned property and pre-1927 community property into post-1927 community property. In our view, the subject property of the instant gift remained liable for the estate tax on decedent's death, and, by the same token, would not have been liable for a gift tax. See *Estate of Sanford v. Commissioner,* 308 U. S. 39. *Cf. Smith .v Shaughnessy,* 318 U. S. 176.

is clear that her interest is not a present and existing interest in the same sense that the husband's interest is a present and existing interest. That their interests are not equal in all respects, is also clear. This Court recognized in the *Goodyear* case that the community property remains subject to the management and control of the husband after Section 161 (a) was enacted (p. 527). The interest given to the wife under Section 161(a) is circumscribed by this fact. As we have seen, the recent California decisions strongly imply that the sections merely attached a label to the wife's interest without significance, at least as far as the husband's management and control are concerned. The equality of ownership between them, therefore, can only extend to some kind of a technical ownership. The *Goodyear* opinion further stated (p. 527) that by force of the transfer, both "spouses had possession and enjoyment of the property and owned the income therefrom." No California cases were cited for the proposition that the wife, equally with the husband, had possession or enjoyment of the community property. The provisions giving the husband management and control negative any such theory and the situations which appear in Paragraph 5, *supra*, indicate that in making this statement also the Court was using the terms "possession" and "enjoyment" in a technical sense and not in the sense of actual possession and enjoyment. This conclusion is strengthened by the fact that later in the opinion, the Court asserted only (p. 527) that—

> We think that *theoretically* each spouse had possession and enjoyment of his particular interest. [Italics supplied.]

Whatever "ownership" interest may be said to have been conferred upon the wife by Section 161 (a) and whatever possession and enjoyment may be said to have been given her, she may be deprived of that interest and ousted from that possession and enjoyment without her consent and against her wishes in consequence of her husband's actions. *Grolemund v. Cafferata, supra; Estate of Coffee, supra.* See *Hannah v. Swift,* 61 F. (2d) 307 (C. C. A. 9th).

Both Judge Stephens, dissenting in the *Goodyear* case (99 F. (2d) at p. 532), and Judge Jenney in his original opinion in the present case (23 F. Supp. at p. 280) expressed the view that the effect of the 1927 amendment was to give the wife an "ownership interest" or the "enjoyment of ownership" in one-half of the community property. We may assume that this was the result of that amendment, giving these words the significance attributed to them by their authors. But this change is wholly immaterial for present purposes. Judge Stephens, probably, and Judge Jenney, expressly, took the view that this did not give the wife a greater possessory interest than she had before 1927. In the words of Judge Jenney, referring to the situation after the 1927 amendment (23 F. Supp. at p. 280):

> The Legislature must have wanted to endow the wife in the present with rights of ownership which would be more than merely expectant but would be existent—such that they would not be subordinate but would be equal to the husband's. *The possession, management, and control, and the right to alienate or hypothecate, remained solely in the husband;* the bare legal title, the right of ownership as now defined, was divided equally between the spouses. [Italics supplied.]

Upon this examination of the benefits and powers reserved to the husband under the transfer, we turn to the application of the federal estate tax.

C. The Application of Section 302 (c) and (d).

Prior to the 1927 amendment, the husband retained such an aggregate of advantages with respect to California community property as to require the inclusion of its full value in his gross estate. See *Gillis v. Welch, supra,* and other cases cited above. Although the Supreme Court of California has not said so, we may assume that the effect of the 1927 amendment was to vest in the wife an "ownership" interest equal to that of the husband in the community property thereafter acquired. At the same time, the 1927 amendment did not affect the husband's management or control of the community property or the other substantial rights of the parties in regard to it. Assuming, upon the husband's death, that the 1927 amendment was effective to withdraw the wife's share of the community property from the scope of Section 302 (a), it is still necessary to deal with Section 302 (c) and (d) in transfer cases, such as the present. The application of the latter subsections is not frustrated by the fact that a legal interest has been vested in a grantee prior to the decedent's death; they are not concerned with the refinements of legal title, but with the substance of possession, control and enjoyment. The inquiry under these subsections is directed to the question whether the disposition of the substantial incidents of ownership has been held in suspense until the decedent's death. *Helvering v. Hallock, supra.* Even other sections of the revenue laws, which do not in ex-

press terms deal with transfers, are concerned less with the technicalities of legal title than with the substantial control, advantages and satisfactions which go with the concept of ownership. *Harrison v. Schaffner,* 312 U. S. 579; *Helvering v. Eubank,* 311 U. S. 122; *Helvering v. Horst,* 311 U. S. 112; *Helvering v. Clifford,* 309 U. S. 331. But the 1927 amendment leaves these vital considerations untouched. Consequently, it seems almost capable of mathematical demonstration that a transfer such as that involved in the instant case is insufficient to exclude the full value of the transferred property from the decedent's gross estate.

Apart from the foregoing sequence of cases and amendment, it seems clear that the instant case falls within Section 302 (c) and (d). Under Section 302 (c) the full value of the property is taxable where "possession" is retained by the transferor. As we have seen, the decedent's reservation of his powers of management and control over the transferred property carried with it the exclusive right to possession.[16] We do not think that the wife even "theoretically" had a right to possession. But if she did, under some concept foreign to the common law meaning of possession,[17] it was the kind of technical interest irrelevant to the application of Section 302 (c) and (d). *McCaughn v. Girard Trust Co.,* 11 F. (2d) 520 (C. C. A. 3d); *Holland v. Commissioner,* 47 B. T. A. 807 (Supplemental opinion), 1 T. C. 564. See *Common-*

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[16]On the facts of the present case there can be no doubt that decedent in fact retained possession, as well as the right to possession. [R. 207-208.]

[17]In the common law sense, it is impossible to define "possession" except in terms of "control." See 1 Restatement, Property (1936), Section 7; 1 Restatement, Torts (1934), Sections 157 and 216. Surely "possession" as used in Section 302 (c) should not be given a narrower and more technical meaning than at common law.

wealth Trust Co. v. Driscoll (W. D. Pa.), decided January 28, 1943 (1943 Prentice Hall, Par. 62,452), affirmed *per curiam* by the Circuit Court of Appeals for the Third Circuit July 9, 1943 (1943 Prentice Hall, Par. 62,749), taxpayer's petition for rehearing now pending.

It is perhaps even clearer that the wife's "enjoyment" of the transferred property was held in suspense during decedent's lifetime, and did not become fixed until his death. As we have seen, decedent during his lifetime could divest the wife completely of her "ownership" interest in any part or all of the community property, which could be applied in satisfaction of his own personal obligations. Even after his death, the community property remained liable for his debts and the residue finally placed at the full disposal of the wife could be determined only after all such obligations were satisfied.

In the *Hallock* case the decedent had created a trust under a separation agreement, giving the income to his wife for life and providing that upon her death the trust should terminate and the corpus should be paid to him if he survived and if not, should be paid to others. When the settlor died in 1932 his divorced wife, the life beneficiary, survived him. The Circuit Court of Appeals had held that the trust instrument had conveyed the whole interest of the decedent subject only to a condition subsequent, which left him nothing except a mere possibility of reverter and hence, that the value of the remainder could not be included in the gross estate, as a transfer intended to take effect in possession or enjoyment at or after death, within the meaning of Section 302 (c) of the Revenue Act of 1926.

The Supreme Court rejected the argument that the decision should turn on the nature of the remainder in-

terest, and instead approved the principle established in *Klein v. United States,* 283 U. S. 231, where the court had said (at p. 234) that the test was whether or not "the death of the grantor was the indispensable and intended event which brought the larger estate into being for the grantee and effected its transmission from the dead to the living." The court added that the rationale of the *Klein* decision was that the statute taxes not merely those interests which are deemed to pass at death according to the refined technicalities of the law of property, but also taxes *inter vivos* transfers that are too much akin to testamentary dispositions not to be subjected to the same excise. Section 302 (c) applied, since the grantor retained in himself the possibility of regaining the transferred property.

The case is squarely within the *Hallock* case, since the decedent's death was the indispensable condition which assured the wife's possession and enjoyment of any part of the property included in the transfer. If there is a distinction, on the facts, the instant case is a stronger case than the *Hallock* case, where the decedent's death could not affect the life estate previously transferred, and the husband reserved none of the rights of management and control which were vested in the decedent here.

Applying the *Hallock* rule, many cases have held Section 302 (c) applicable where the power of the decedent to invade the corpus of the transferred property or to divert it to others was far more rigidly limited than in the present case. *Blunt v. Kelly,* 131 F. (2d) 632 (C. C. A. 3d); *Bankers Trust Co. v. Higgins* (C. C. A. 2d), decided June 18, 1943 (1943 Prentice Hall, Par. 62,707);[18]

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[18]This case also involved a complicated problem of valuation not presented in the instant case.

Lehman v. Commissioner, 109 F. (2d) 99 (C. C. A. 2d), certiorari denied, 310 U. S. 637; *Brewer v. Hassett* (Mass.), decided February 24, 1943 (1943 Prentice Hall, Par. 62,520). See *Durant v. Commissioner,* 41 B. T. A. 462. Also see, as to the application of Section 302 (c), *Commissioner v. Clise,* 122 F. (2d) 998 (C. C. A. 9th), certiorari denied, 315 U. S. 821; *Mearkle's Estate v. Commissioner,* 129 F. (2d) 386 (C. C. A. 3d).

Decedent was under a duty to support his wife and any minor children. This obligation did not arise by virtue of the community property system, but could have been satisfied either out of his own property or community property. Even assuming, although there is no basis for the assumption, that some identifiable portion of the community property was earmarked for the support of the wife, this would not alter the result. To the extent that the corpus of the community property transferred was dedicated to the wife's support, it was used to satisfy a legal obligation of the decedent, and was thus includible in his gross estate under the analogy of *Douglas v. Willcuts,* 296 U. S. 1. See *Helvering v. Mercantile-Commerce Bank & Trust Co.,* 111 F. (2d) 224 (C. C. A. 8th), certiorari denied, 310 U. S. 654. *Cf. Helvering v. Stuart,* 317 U. S. 154, 169-171, rehearing denied, 317 U. S. 711.

Indeed, it is reasonable to argue that even apart from the elements of management and control, possession and enjoyment, the transferred property falls under Section 302 (c). For the transfer was subject to the contingency that the wife's share of the community property should revert to the decedent if she predeceased him intestate. It seems correct, in principle, that the degree of remoteness of the reversion to the decedent does not frustrate the application of the *Hallock* principle. In an analogous sit-

uation, where the reversion was dependent upon death intestate, the Board of Tax Appeals has held Section 302 (c) applicable. *Lloyd v. Commissioner,* 47 B. T. A. 349, now pending decision before the Circuit Court of Appeals for the Third Circuit. We mention this as a valid ground of decision without placing primary reliance upon it in the instant case.

Similarly, the instant case falls well within the scope of Section 302 (d). The decedent here retained a right to alter, amend and revoke the disposition of the property included within the transfer. Section 302 (d), however, is still broader and encompasses the situation where the right to alter, amend or revoke is reserved "by the decedent alone or in conjunction with any person." The term "any person" includes a beneficiary of the transfer. *Helvering v. City Bank Co.,* 296 U. S. 85. We have seen that the decedent could even make gifts of the community property, real and personal, with the consent of his wife and without her consent, he may by other means than making gifts divest her of her interest in community property. The following cases require the inclusion of the full value of the transferred community property within the decedent's gross estate: *Helvering v. City Bank Co.,* 296 U. S. 85; *Porter v. Commissioner,* 288 U. S. 436; *Welch v. Terhune,* 126 F. (2d) 695 (C. C. A. 1st), certiorari denied, 317 U. S. 644; *Howard v. United States,* 125 F. (2d) 986 (C. C. A. 5th); *Mellon v. Driscoll,* 117 F. (2d) 477 (C. C. A. 3d), certiorari denied, 313 U. S. 579; *In re Tyler's Estate,* 109 F. (2d) 421 (C. C. A. 3d); *Adriance v. Higgins,* 113 F. (2d) 1013, 1015 (C. C. A. 2d); *Dort v. Helvering,* 69 F. (2d) 836, 841 (App. D. C.); *Commonwealth Trust Co. v. Driscoll, supra.* Also see *Chase Nat. Bank v. United States,* 278 U. S. 327, 335; *Reinecke v. Northern Trust Co.,* 278 U. S. 339,

345; *Saltonstall v. Saltonstall,* 276 U. S. 260, 271; *Tyler v. United States,* 281 U. S. 497.

In summary, under the provisions of the transfer now before the Court, it was the decedent's death which "brought into being or ripened for the survivor" (*Tyler v. United States,* 281 U. S. at p. 503) "property rights * * * which before could not be exercised" (*Title Insurance & Trust Co. v. Goodcell,* 60 F. (2d) at p. 804). It was decedent's death which passed to the wife the "valuable assurance" (*Porter v. Commissioner,* 288 U. S. at p. 444) that she would not be divested of the interest transferred to her *inter vivos.* Decedent's death was the "indispensable and intended event" (*Klein v. United* States, 283 U. S. 231, 234) which "freed" the wife's interest from the "contingency" (*Helvering v. Hallock,* 309 U. S. at p. 113) that she might never reduce it to possession and enjoyment. The full value of the property should therefore be included in decedent's gross estate under Section 302 (c) and (d).

Conclusion.

For these reasons the judgment of the District Court should be reversed.

Respectfully submitted,

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APPENDIX.

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * * * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise * * * intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth * * *

(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke * * * except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *

* * * * * * * * *

Civil Code of California (1929):

Sec. 161. [*Joint tenants.*] A husband and wife may hold property as joint tenants, tenants in common, or as community property. [Enacted 1872.]

Sec. 161a. [*Respective interests; community property.*] The respective interests of the husband and wife in community property during continuance of the marriage rela-

tion are present. existing and equal interests under the management and control of the husband as is provided in sections 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in community property. [Enacted 1927.]

Sec. 167. [*Wife's contract, community property.*] The property of the community is not liable for the contracts of the wife, made after marriage, unless secured by a pledge or mortgage thereof executed by the husband. [As amended in 1874.]

Sec. 171a. [*Torts.*] For civil injuries committed by a married woman, damages may be recovered from her alone, and her husband shall not be liable therefor, except in cases where he would be jointly liable with her if the marriage did not exist. [Enacted 1913.]

Sec. 172. [*Community personal property.*] The husband has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate; provided, however, that he can not make a gift of such community personal property, or dispose of the same without a valuable consideration, or sell, convey, or encumber the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the wife or minor children that is community, without the written consent of the wife. [As amended in 1917.]

Sec. 172a. [*Community real property.*] The husband has the management and control of the community real property, but the wife, either personally or by duly authorized agent, must join with him in executing any instrument by which such community real property or

any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered; provided, however, that nothing herein contained shall be construed to apply to a lease, mortgage, conveyance, or transfer of real property or of any interest in real property between husband and wife; provided, also, however, that the sole lease, contract, mortgage or deed of the husband, holding the record title to community real property, to a lessee, purchaser or encumbrancer, in good faith without knowledge of the marriage relation shall be presumed to be valid. No action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of the husband alone, executed by the husband alone, shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate, and no action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of the husband alone, which was executed by the husband alone and filed for record prior to the time this act takes effect, in the recorder's office in the county in which the land is situate, shall be commenced after the expiration of one year from the date on which this act takes effect. [As amended in 1927.]

Sec. 1401. [*Distribution of common property, death of wife.*] Upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse, subject to the provisions of section one thousand four hundred two of this Code. [As amended in 1923; now Section 201, Probate Code of California.]

Sec. 1402. [*Same. Death of husband.*] Community property passing from the control of the husband, either by reason of his death or by virtue of testamentary disposition by the wife, is subject to administration, his debts, family allowance and the charges and expenses of administration; but in the event of such testamentary disposition by the wife, the husband, pending administration, shall retain the same power to sell, manage and deal with the community personal property as he had in her lifetime; and his possession and control of the community property shall not be transferred to the personal representative of the wife except to the extent necessary to carry her will into effect. After forty days from the death of the wife, the surviving husband shall have full power to sell, lease, mortgage or otherwise deal with and dispose of the community real property, unless a notice is recorded in the county in which the property is situated to the effect that an interest in the property, specifying it, is claimed by another under the wife's will. [As amended in 1923; now Sections 202 and 203, Probate Code of California.]

Treasury Regulations 70 (1929 Ed.):

Art. 15. *Transfers during life.*—Except bona fide sales for an adequate and full consideration in money or money's worth, all transfers made by the decedent subsequent to September 8, 1916, are taxable if made in contemplation of or intended to take effect in possession or enjoyment at or after his death. If the enjoyment of the property or the interest transferred (whether the property or the interest was transferred by the decedent before or after passage of the Revenue Act of 1916) was subject at the date of the decedent's death to change by

the exercise of any power to alter, amend, or revoke, * * * the entire value of the property, or the interest transferred, as of the date of decedent's death must be included in the gross estate unless the transfer constituted a bona fide sale for an adequate and full consideration in money or money's worth. * * *

Art. 17. *General.*—All transfers made by the decedent subsequent to September 8, 1916, other than bona fide sales for an adequate and full consideration in money or money's worth, which were intended to take effect in possession or enjoyment at or after his death, are taxable, and the value, as of the date of the decedent's death, of property or interest so transferred must be returned as a part of the gross estate.

Art. 19. *Power to change enjoyment.*—The value of property transferred, other than by a bona fide sale for an adequate and full consideration in money or money's worth, constitutes a part of the gross estate if at the time of the decedent's death the enjoyment thereof was subject to any change through a power, exercisable either by the decedent alone or in conjunction with any person, to alter, amend, or revoke.

Treasury Regulations 105, promulgated under the Internal Revenue Code:

Sec. 81.17. *Transfers conditioned upon survivorship.*—The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death," includes a transfer by the decedent prior to his death (other than a bona fide sale for an adequate and full consideration in money or money's worth) whereby and to the extent that the beneficial title to the property

transferred (if the transfer was in trust), or the legal title thereto (if the transfer was otherwise than in trust), is not to pass from the decedent to the donee unless the decedent dies before the donee or another person, or its passing is otherwise conditioned upon decedent's death; or, if title passed to the donee. it is to be defeated and the property is to revert to the decedent as his own should he survive the donee or another person, or the reverting of the property to the decedent is conditioned upon some other contingency terminable by his death. In such instances, it is immaterial whether the decedent's interest arose by implication of law or by the express terms of the instrument of transfer. Since in such transfers the decedent's death is requisite to a termination of his interest in the property, it is unimportant whether his interest be denominated a reversion or a possibility of reverter, and whether the interest of the donee be contingent or vested subject to be divested, and the tax will apply, unless otherwise provided in the next succeeding paragraph, without regard to the time when the transfer was made, whether before or after the enactment of the Revenue Act of 1916. Thus, upon a transfer by a decedent of property in which an estate for life is given to one and an estate in remainder to another, but with a provision added that the estate in remainder shall revest in the decedent should he survive the owner of the life estate, there is to be included, in determining the value of the decedent's gross estate following his death, the value as of the date of his death of the estate in remainder, if the life estate is then outstanding. The value of the outstanding life estate is not to be included in determining the value of the gross estate, unless that estate had been transferred

in contemplation of the decedent's death, or otherwise as to render it a part of the gross estate. If by reason of an election by the executor the valuation of the gross estate is governed by the provisions of section 81.11, adjustments in the values of such transferred estates may be required. (See section 81.15.)

Where the transfer was made during the period between November 11, 1935 (that being the date upon which the Supreme Court of the United States rendered its decisions in the cases of *Helvering v. St. Louis Union Trust Co.* (296 U. S., 39) and *Becker v. St. Louis Union Trust Co.* (296 U. S., 48)), and January 29, 1940 (that being the date upon which such Court rendered its decisions in *Helvering v. Hallock* and companion cases (309 U. S., 106)), and the Commissioner, whose determination therein shall be conclusive, determines that such transfer is classifiable with the transfers involved in such two cases decided on November 11, 1935, rather than with the transfer involved in the case of *Klein v. United States* (283 U. S., 231), previously decided by such Court, then the property so transferred shall not be included in the decedent's gross estate under the provisions of this section, if the following condition is also met: Such transfer shall have been finally treated for all gift tax purposes, both as to the calendar year of such transfer and subsequent calendar years, as a gift in an amount measured by the value of the property undiminished by reason of a provision in the instrument of transfer by which the property, in whole or in part, is to revert to the decedent should he survive the donee or another person, or the reverting thereof is conditioned upon some other contingency terminable by decedent's death.